89-238

Supreme Court, U.S.
FILED
AUG 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO:_____

In the Supreme Court of the United States

October Term, 1989

EDGAR H. HADLEY,

Petitioner,

vs.

HELEN C. HADLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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(a)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Uniformed Services Former Spouse Protection Act (10 U.S.C. 1408) [FSPA] is an impermissible delegation of exclusive Congressional authority and responsibility, in violation of the United States Constitution, Article 1, Section 8, and as such is therefore unconstitutional?

2. Whether the FSPA, if constitutionally valid on its face, permits the Washington state courts to recharacterize the nature of Military Retired/Retainer pay as a property interest, contrary to section (c)(2) of that Act and decisions of this Court?

3. Whether the FSPA, if constitutionally valid on its face, is unconstitutionally interpreted and applied by the Washington state courts, in violation of the due process clause, the contractural impairments clause and the Thirteenth Amendment of the United States Constitution?

(b)

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ORDERS, JUDGMENTS AND OPINIONS DELIVERED BELOW

"Stipulated Interlocutory Judgment of Dissolution of Marriage", July 30, 1979 (Appendix A), "Final Judgment of Dissolution of Marriage", February 27, 1980 (Appendix B), "Memorandum Opinion" of trial court below upon Respondent's motion to reopen the issue in the State of Washington, April 1, 1987, and "Court's Memorandum Opinion of the Applicability of RCW 26.16.200 to the Issue of Whether Judgment Against Defendant Edgar H. Hadley, Individually, is Appropriate", upon Respondent's motion for reconsideration, May 18, 1987, (Appendix C), "Findings of Fact, Conclusions of Law and Judgment" of the trial court, August 20, 1987, and "Addendum to Findings of Fact, Conclusions of Law and Judgment" of the trial court, August 20, 1987 (Appendix

D), Opinion of the Court of Appeals of the State of Washington, Division III, January 31, 1989, 53 Wash.App. 1044, (Appendix E), "Order Granting Motion for Extension of Time to File Petition for Review and Denying Petition for Review" of the Washington State Supreme Court, May 9, 1989, 112 Wash. 2d 1022, (Appendix F).

None of the decisions of the courts below are officially published.

(e)

GROUNDS UPON WHICH JURISDICTION IS INVOKED

(i)

Proceedings Below

Petitioner argued below through the trial court and appellate courts that the Uniformed Serivces Former Spouse Protection Act, 10 U.S.C. 1408, hereinafter FSPA, is unconstitutional both on its face and as applied.

Petitioner argued, inter alia,

that the FSPA is an impermissible delegation of exclusive congressional authority and responsibility, in violation of the Constitution of the United States, Article I, section 8. Petitioner argued that even if the FSPA were constitutional on its face, the State of Washington was not free to recharacterize the nature of military retired/retainer pay as a "property" right in contravention of this Court's holdings, as specifically prohibited by the plain language of the FSPA itself, and as violative of the Fifth, Thirteenth and Fourteenth Amendments, as well as the supremacy clause and contract impairment clause of the Constitution of the United States.

Petitioner argued that the courts of the State of Washington were violating state statutes, specifically the Revised Code of Washington, (R.C.W.) 26.16.200 and/or 6.15.020.

The Washington State courts have

summarily rejected and denied each argument.

(ii)

Judgment Sought to be Reviewed

The Supreme Court of the State summarily denied review of the decision of the Court of Appeals, Division III, which was filed on January 31, 1989, which remains the last definitive ruling in this case. The judgment of the Washington State Supreme Court was entered on May 9, 1989. Notice of Petition for Writ of Certiorari to this Court was filed in the Supreme Court of the State of Washington, the court possessed of the record herein, on August 1, 1989.

This Petition is docketed within ninety days of the entry of the order denying review by the Supreme Court of the State. As this action involves a direct constitutional challenge to an Act of Congress, 28 U.S.C. 2403 (a) may

apply, and this Petition is being served on the Solicitor General of the United States.

(iii)

Statutory and Case Authority Sustaining Jurisdiction

This action involves a challenge to the constitutionality of 10 U.S.C. 1408. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a), and this Court's decisions in United States v. Tyler, 105 U.S. 244 (1881); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); Bell v. United States, 366 U.S. 393 (1961); McCarty v. McCarty, 453 U.S. 210 (1981); United States v. Larionoff, 431 U.S. 864 (1977); Costello v. United States, 442 U.S. 929 (1979), and Mansell v. Mansell, No: 87-201, ____ U.S. ____, May 30, 1989.

(f)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves a challenge to

the constitutionality of, and/or an interpretation of the Uniformed Services Former Spouse Protesction Act, Pub. L. 97-252, codified as 10 U.S.C. 1408, which is set forth in full in Appendix I. In particular, the case involves subsections (c)(1) and (c)(2), which are set out below. Subsection (c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. (Emphasis added).

Subsection (c)(2) provides:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

Several other federal statutes are involved to the extent that they peripherally support Petitioner's contentions. These are set forth in

pertinent part in the Appendices. These statutes are 10 U.S.C. 101(27), 10 U.S.C. 267 and 10 U.S.C. 276 (Appendix G); 10 U.S.C. 672 and 10 U.S.C. 688 (Appendix H); and 29 U.S.C. 1002(32) and 29 U.S.C. 1003 (Appendix J). State statutes in apparent conflict are set out in Appendix K. The Constitutional provisions involved are Article I, sections 8, 9, and 10; Article VI, clause 2; and the Fifth, Thirteenth and Fourteenth Ammendments to the Constitution (Appendix L).

(g)

STATEMENT OF THE CASE

Petitioner, a retired member of the uniformed military services, responded to an action in the Superior Court, County of Spokane, State of Washington, attempting to clarify a Decree of Dissolution entered in the State of California some 7 years earlier. The action alleged, inter

alia, that Petitioner owed some past due indebtedness, sought division of Petitioner's veterans disability compensation, division of his gross retired pay, and a recharacterization of the original Decree from "property" to spousal support. After trial, Petitioner prevailed on all claims. Upon timely motion for reconsideration, the trial court did find that Washington Revised Code (R.C.W.) 26.16 .200 did not bar one of the claims, and awarded a judgment against Petitioner in his individual capacity on that claim only.

Respondent timely appealed to the Court of Appeals, Division III, which court reversed the trial court on all issues that were favorable to the Petitioner, except for the division of Petitioner's disability compensation, per se. The Court of Appeals did, however, the very act prohibited by Mansell v. Mansell, No: 87-201, decided

by this Court on May 30, 1989, and awarded Respondent a division of Petitioner's gross military retired pay, which includes those amounts waived from retired pay for disability compensation.

Petitioner timely appealed to the Washington State Supreme Court, which court summarily denied the appeal, and affirmed the Court of Appeals by inaction. Petitioner hereby timely Petitions this Court to resolve this important question.

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(h)

ARGUMENT

(1) The Former Spouse Protection Act is Unconstitutional as an Impermissible Delegation of Exclusive Congressional Authority

Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its authority. A similar question was decided in Knickerbocker Ice Company v. Stewart, 253 U.S. 149 (1920). Congress is exclusively authorized by the Constitution to fix and address remedies for seamen injured at sea. Congress enacted legislation which provided an election of remedies for the seamen under the various laws of the various states. This Court held that the delegation of power to the states which would control, or affect

the congressional schema was an unconstitutional delegation of authority by Congress.

State courts will be preempted upon a showing of (1) an expression of congressional purpose or intent to preempt the field, (2) pervasiveness of the schema, (3) nature of the field as federal in character, and (4) the inherent need for nationwide uniformity. Congress has preempted the field and has established a pervasive schema by exercising its authority pursuant to the United States Constitution, Article I, section 8, cls. 12, 13, 14, and 16; Article VI, clause 2. Accordingly, the field is exclusively federal in character, United States v. Tarble, 80 U.S. 397 (1872).

Given similar circumstances in the case of military pay, Petitioner urges this Court to find that FSPA is likewise unconstitutional. The FSPA

specifically purports to delegate to each state the authority to "treat" the pay "in accordance with the laws of the State". This is precisely the issue laid to rest by this Court in Knickerbocker. Where the delegation abdicates to the states a power or authority granted exclusively by the Constitution to Congress, the Act is an impermissible delegation of non-delegable power.

Congress alone has the power and authority to regulate pay for military service and to determine what constitutes military service for which compensation is required or payable. United States Constitution, Article I, section 8, Clauses 12, 13, 14, and 16; United States v. Standard Oil, 332 U.S. 301 (1947) [holding personnel affairs/pay subject exclusively to U.S. regulations]; Free v. Bland, 369 U.S. 663 (1962) [holding that federal law and congressional enactments control

the determination of the character of retired pay as present earnings]; McCarty v. McCarty, 453 U.S. 210 at 232 (1981). State courts may not redefine military retired pay. Wissner v. Wissner, 338 U.S. 655 (1950). Petitioner is under contract for services and is, therefore, an employee of the United States Armed Forces, continuing to serve the United States Air Force as a non-commissioned officer on retired reserve status. 5 U.S.C. 8311 (1)(c). His right to receive pay or retired pay is established by federal statute. It is "pay" for "employees", 5 U.S.C. 8311 (3), not an annuity or deferred compensation, 5 U.S.C. 8311 (2). Bell v. United States, 366 U.S. 393 (1961) [holding that a soldier's entitlement to pay is dependent upon a federal statutory right]; Goodley v. United States, 441 F.2d 1175 (Ct.Cl. 1971); Costello v. United States, 442 U.S. 929 (1979)

[stating "the contract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service"], and is a yearly appropriation by Congress in consideration for his continuing service and observance of restrictions. United States v. Larionoff, 431 U.S. 864 (1977). Petitioner is under numerous restrictions as a requisite of receiving that pay, such as forfeiture of pay upon employment subject to "supervision and control" of foreign government; Hostinsky v. United States, 292 F.2d 508 (Ct.Cl. 1961). Other restrictions include: (a) reductions in pay if certain employment accepted (5 U.S.C. 5532); (b) forfeiture of pay for certain crimes (5 U.S.C. 8312); (c) forfeiture if employed by a foreign government (U.S. Const. Art. I, sec. 9 Cl. 8); (d) forfeiture of pay for employment with defense work for private firms within three years of

retirement (37 U.S.C. 801)(1); (e) recall involuntarily (10 U.S.C. 672, 688, 3504(a); (f) forfeiture if foreign citizenship is acquired (37 Comp.Gen. 207; 41 Comp.Gen. 715); (g) subject to UCMJ.

Congress has determined that while the military member is on an indefinite service contract with this nation, he will continue in the capacity of his "retiring" rank unless he violates the terms and conditions of his employment contract with the United States Armed Forces. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing (but reduced) service to the United States Armed Forces. United States v. Tyler, 105 U.S. 244 (1881); United States v. Morton, 112 U.S. 1 (1884); United States v. Mills, 197 U.S. 223 (1904); Kahn v. Anderson, 255 U.S. 1 (1920); Leonard v. United States, 279

U.S. 40 (1928); Costello v. United States, 587 F.2d 424 (9th Cir., 1978) cert. den., 442 U.S. 929 (1979); McCarty v. McCarty, supra; Lockhart v. Mittlemann, 123 F.2d 703 (2nd Cir. 1941); Hooper v. Hartman, 163 F.Supp. 437, (S.D. Cal. 1958) aff'd 274 F.2d 429 (9th Cir., 1959); Chambers v. Russel, 192 F.Supp. 425 (N.D. Cal. 1961); Hostinsky v. United States, 292 F.2d 508, 154 Ct.Cl. 443 (1961); Andrews v. United States, 175 Ct.Cl. 561 (1966); Watson v. Watson, 424 F.Supp. 866 (1976); Puglisi v. United States, 564 F.2d 403 (Ct.Cl. 1977) cert. den. 435 U.S. 968 (1978). For over one hundred years, the federal courts have recognized and held that in the absence of a retainer paid to the military member on inactive duty status, the United States would be without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active

duty, United States v. Tyler, supra.

This Court recently addressed a corollary issue in Mansell v. Mansell, No: 87-201, decided May 30, 1989. While the Court did not have the opportunity to address the pivotal issue of the very unconstitutionality of the act itself, it did reiterate in that decision that the courts of the states may not go beyond the language of the statute.

(2) The FSPA, if Constitutional does not Permit the State of Washington to Recharacterize a Retiree's Current Wages as Deferred Compensation

Military retired pay is paid to the military member as a "personal entitlement" for personal services rendered to the United States Armed Forces. Lemly v. United States, 75 F.Supp. 248, 109 Ct.Cl. 760 (1948); Wissner v. Wissner, supra, at 657 (1950); 10 U.S.C. 2771; McCarty v. McCarty, supra.

Petitioner herein states a federal question, specifically, the definition of federal payments made to federal employees pursuant to federal statutes. Title 10 of the United States Code states that "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay and equivalent pay. 10 U.S.C. 101(27). The United States Internal Revenue Code defines "pay" as "wages", and specifically retired or retainer pay at 26 U.S.C. 61(a)(11). The FSPA, 10 U.S.C. 1408, does not redefine that pay.

The question yet remains: is that pay current compensation, as this Court and the lower federal courts have consistently held in the past, United States v. Tyler, supra, and subsequent cases previously cited, or is it deferred compensation as the courts of the State of Washington hold? In the McCarty decision which precipitated the

FSPA, this Court expressly declined to rule whether a state could characterize retired pay as deferred compensation. Id. at 223.

Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law. Caterpillar v. Williams, 482 U.S. ____, 96 L.Ed.2d 318 (1987)

Petitioner alleges that the FSPA, should this Court determine that it is Constitutional on its face, permits the state courts to do one and only one thing, specifically:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C. 1408 (c)(1) (Emphasis added.)

State courts thus may apply state law

to the "thing" (retired/retainer pay), as defined by federal law, not redefine the "thing" in contravention of federal law. Petitioner alleges that 10 U.S.C. 1408 purported to allow the states no other latitudes.

Neither the Ninth Circuit nor this Court has revised or amplified the holding of the Ninth Circuit in Costello, supra, that "retirement pay does not differ from active duty pay in its character as pay for continuing military service". Id at 427. That very definition is as alleged by Petitioner, and is ignored by the courts of the State of Washington.

The courts of the State of Washington ignore Title 10 and Title 26 of the U.S.C., their own statutes, Wash.Rev.Code Ann. 26.16.140 and Wash.Rev.Code Ann. 6.15.020, (Appendix K), and established and extensively cited federal case law, by defining military retired/retainer pay as a

"pension", as "deferred" compensation. See for example Marriage of Parks, 48 Wash.App. 166, 737 P.2d 1316 (1987). This erroneous classification then "permits" the courts of the State of Washington, albeit in violation of R.C.W. 6.15.020 and 29 U.S.C. 1003, and 29 U.S.C. 1002 (32)(Appendix J), to divide this purported "property" in dissolution of marriage actions.

The preemptive force of Title 10 and Title 26 of the United States Code are so powerful as to displace entirely any state action redefining the nature or character of a federally originated, defined and administered subject as the United Stated Armed Forces or the pay, entitlement or other regulation thereof.

As this Court so correctly stated, "[the] statutory language is straightforward: 'A member of the Army [or Air Force, or Marines, or Navy, under corresponding statutes] retired under

this chapter is entitled to retired pay...' 10 U.S.C. 3929". McCarty, supra, at 223. This Court went on to say that:

> At the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that states must tread with caution in this area, lest they disrupt the federal scheme. (Citations omitted) Id. at 223, f.n. 16.

Thus, the sustaining of retainer pay as a "personal entitlement" and the "current earnings" characterization is crucial to federal goals and objectives, United States v. Tyler, supra; Costello v. United States, supra; ; McCarty v. McCarty, supra, 10 U.S.C. section 2771. Consequently, state courts are preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

The State of Washington is thus discriminating against military retirees and Petitioner by this classification, and thereby placing him in involuntary servitude for the rest of his lifetime, in repugnance to the Thirteenth Amendment of the Constitution of the United States.

(3) The FSPA, if Constitutional is Unconstitutionally Applied by Washington Courts, and Discriminates against Petitioner

It is imperative to maintaining the stability of the armed forces that the consideration a member receives for his service is uniform and does not vary from state to state. The unconstitutional effect is very simple. The Fourteenth Amendment of the United States Constitution provides and guarantees to Petitioner that "[n]o State... shall deprive any person of life, liberty, or property, without due process of law;...".

There is no property right in military retired/retainer pay not yet earned. 10 U.S.C. 1408 is an unconstitutional delegation of authority by Congress to the states. Even so, it states:

> Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. 10 U.S.C. 1408 (c)(2).

Indeed, the enabling provision of that statute is extremely limited in scope. It states:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member . . . either as the property of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C 1408 (c) (1) (Emphasis added).

That section only purports to allow the state courts to consider disposable income, not the gross income. It further defines it as pay, and only

allows the state courts to consider that pay payable. It further only allows the state courts to consider that pay payable as property of the member or his spouse. It further only allows the state courts to so consider such disposable pay payable to a member and/or his spouse in accordance with the laws of the state. Disposable is defined as the gross income, less taxes required to be withheld, less FICA, less union dues, if any, by Washington law, and is further defined within 10 U.S.C. Pay is defined as wages, remuneration for services. Payable is defined as that which is due and owing, which can be demanded. Spouse is defined as one's marital partner, not one's former marital partner.

The laws of the State of Washington prohibit the division of one's future wages. R.C.W. 26.16.140. Even though the courts may consider and divide all "property", whether

community or separate, and "while under certain circumstances [a court may] award part or all of one spouse's separate property to the other, the situations which warrant such action are exceptional". Moore v. Moore, 9 Wash. App. 951, 515 P.2d 1309 (1973). Unearned future income is not, however, property. 10 U.S.C. 1408 purports to permit the courts to treat that pay payable at the time of dissolution, and nothing more. 10 U.S.C. 1408 was enacted in an attempt to overcome the federal preemption, albeit, unconstitutional, and nothing more, and by its own terms made no redefinition, nor created any rights that did not already exist.

The FSPA (10 U.S.C. 1408(c)(1)) states that the state courts may consider retired/retainer pay payable either as property of the member or member and his/her spouse, in accordance with the laws of that state.

It does not say that the state courts shall divide military pensions, regardless of when payable, in spite of the laws of the state. It does not say that because the Petitioner is a military retiree, the State can ignore the plain language of the federal law and case law, and nevertheless, arbitrarily reclassify this "pay" to "deferred compensation", so to do an end run around one statute, R.C.W. 26.16.140, and then ignore R.C.W. 6.15.020.

Federal statutes are to be construed to achieve uniform result throughout the nation. Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204, 209 (1946). Congress legislates with full awareness of the cannons of statutory construction. Lorillard v. Pons, 434 U.S. 575, 580 (1978); Cary v. Curtis, 44 U.S. 236, 240 (1845). The case at bar is ripe for review. The issue is an important

one. This Court is empowered with authority to issue declaratory relief, to give a definition to allow for uniform results. If this Court finds that the FSPA is Constitutional on its face, the uniformity sought is a declaration as to the character of military retired/retainer pay, either as pay, as Petitioner contends, or as a pension, as the State of Washington contends, to permit all states then to apply that same characterization under the law of the jurisdiction.

CONCLUSION

Congress alone has the power to provide and maintain the armed forces and to make rules and regulations therefore. U.S. Constitution, Article I, sec. 8, cls. 12, 13 and 14. Congress has defined military retired/retainer pay. 10 U.S.C. 101(27). Congress' enactment of the

FSPA, 10 U.S.C. 1408, is unconstitutional as an impermissible delegation of exclusive congressional authority and responsibility. Even should this Court find it to be constitutional on its face, it is unconstitutionally applied to Petitioner herein.

The FSPA did not redefine military retired/retainer pay. The State of Washington has done so. By so doing, the courts of the State of Washington discriminate against the Petitioner herein by placing him in a state of involuntary servitude, repugnant to the Thirteenth Amendment to the Constitution of the United States.

Petitioner respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of Washington, and a ruling that 10 U.S.C. 1408 is unconstitutional, or in the alternative, that the courts of the State of Washington are bound by the

clear language of the statute, and are not now, and have never been free to redefine or recharacterize the nature of the compensation paid to employees of the United States Armed Forces on the retired reserve rolls.

Respectfully submitted this 1st day of August, 1989.

BENJAMIN & PERREY, P.S.

GARY H. BENJAMIN
Attorney for Petitioner

APPENDICES

APPENDIX A

REED, SAMUEL, REMY & BRODIE
Attorneys at Law
717 K Street, Suite 405
Sacramento, California 95814
(916) 446-5266

Attorney(s) for Petitioner

ENDORSED: July 30, 1979

J.A. SIMPSON, CLERK
By L. STEPHENS, Deputy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

In re the marriage of

Petitioner: HELEN C. HADLEY

and

Respondent: EDGAR H. HADLEY

STIPULATED INTERLOCUTORY JUDGMENT
OF DISSOLUTION OF MARRIAGE

Fresno County No. 278267-0

CASE NUMBER 728307

This proceeding was on 7-12-79
(Date)

before the Honorable HORACE E.

CECCHETTINI

Department No. 15.

The court acquired jurisdicition of the respondent on August 10, 1977 by:

_____ Service of process on that date, respondent not having appeared within the time permitted by law.

__X__ Service of process on that date and respondent having appeared.

_____ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a

dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other an further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

THE COURT ALSO ORDERS:

(See Attached)

Form Adopted by Rule 1287 of Judicial Council of California Effective January 1, 1970

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

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2. DIVISION OF COMMUNITY PROPERTY

A. Respondent shall pay to Petitioner the sum of $3,500.00 as and for her community interest in the residence of the parties. Petitioner shall execute a Quit Claim Deed to such a premises to Respondent upon receipt of such payment. If such payment is not made to Petitioner within 60 days of notice to Respondent of the entry of this judgment, Petitioner may apply and the Court shall order a sale of the premises and payment to Petitioner.

B. (1) Respondent shall pay to Petitioner a sum equal to three-sevenths (3/7) of all amounts he receives monthly as

and for his military retirement pay. Such fraction shall remain constant so that Petitioner will receive the benefit of any increases in retirement benefits payable to Respondent. Respondent shall notify Petitioner the amount of any future increases in military retirement benefits within thirty (30) days from his notification of such increases. Such payments shall commence the month next following entry of this judgment and shall be mailed or otherwise made by the fifteenth day of each month. Petitioner shall pay taxes on the monies received by her pursuant to this paragraph.

(2) In full payment of her share of military retirement benefits received by Respondent since the date of separation, Petitioner

agrees to accept, and Respondent agrees to pay to Petitioner the sum of two thousand seven hundred dollars ($2,700.00). Such sum shall be payable upon notice to Respondent of entry of this judgment.

. . . .

C. (3) The parties shall retain as their sole and separate property any other property not mentioned herein which is currently in the possession or under the control of either of them.

D. The parties hereby acknowledge that the foregoing division of community property is substantially equal.

3. SPOUSAL SUPPORT

The court reserves jurisdiction in the matter of spousal support for Petitioner, Helen C. Hadley, for a period of two years from the date of this judgment, with

the understanding and provision that no charge or granting of spousal support will be made unless Petitioner, Helen C. Hadley, can show a change in circumstances necessitating spousal support and can prove that she has atempted to become self-supporting, has worked whenever possible, or has education or training to provide her with minimum skills with which to become gainfully employed. Petitioner acknowledges that after said two year period she may not at any time receive spousal support from Respondent.

. . . .

5. ATTORNEY FEES AND COURT COSTS

Each party shall be responsible for and shall pay his or her own attorney fees and costs of court.

6. WAIVER; REQUEST

A. Each party hereto waives findings of fact, conclusions of law and right to appeal herein.

B. The parties agre that Petitioner may proceed to judgment herein as if by default.

/s/
HELEN C. HADLEY
Petitioner

/s/
EDGAR H. HADLEY
Respondent

/s/
JAMES S. REED
Attorney for
Petitioner

/s/
GARY J. GAINER
Attorney for
Respondent

DATE: _____

IT IS SO ORDERED:

DATE: July 20, 1979

HORACE E. CECCHETTINI
JUDGE OF THE SUPERIOR
COURT

APPENDIX B

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS:)

TELEPHONE NO.

JAMES S. REED
REED, SAMUEL & REMY
717 K Street, Suite 405
Sacramento, California 95814

(916)446-5266

ATTORNEY FOR (NAME):

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

STREET ADDRESS: 720 Ninth Street
MAILING ADDRESS: same
CITY AND ZIP CODE: Sacramento, California 95814
BRANCH NAME:

MARRIAGE OF HADLEY

PETITIONER: HELEN C. HADLEY

RESPONDENT: EDGAR H. HADLEY

FINAL JUDGMENT OF

XX DISSOLUTION OF MARRIAGE

____ LEGAL SEPARATION

____ NULLITY

FOR COURT USE ONLY

FILED February 27, 1980
J.A. Simpson, Clerk
By G. Shackelford, Deputy

Case Number: 728307

---

1. The court acquired jurisdiction of the respondent on (date): 8-10-77

2. THE COURT ORDERS

a. __XX__ A final judgment of disolution be entered, and the parties are restored to the status of unmarried persons.

b. _____ A judgment of legal separation be entered.

c. _____ A judgment of nullity be entered on the ground of (specify):

and the parties are declared to be unmarried persons.

3. ____ THE COURT FURTHER ORDERS

a. _____ This jugment be enterd nunc pro tunc as of (date):

b. _____ Wife's former name be restored (specify):

c. ____ Other:

4. Total number of pages attached:

ATTEST:
J.A. SIMPSON, CLERK
By: G. SHACKELFORD, CLERK
APR 05 1983

No attachment permitted on less than a full page. Cal Rules of Ct 201(b)

Form Adopted by Rule 1289
Judicial Council of California
Revised January 1, 1980

FINAL JUDGMENT
(FAMILY LAW)

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

HELEN C. HADLEY Plaintiff, vs. EDGAR H. HADLEY, individually; and EDGAR H. HADLEY and MARY HADLEY, as husband and wife, Defendants.	MEMORANDUM OPINION 82-2-01660-2 87-2-00245-9

Defendant Edgar Hadley and Plaintiff Helen Hadley were married in October of 1950. Mr. Hadley was then in the Air Force. The married couple had children who are now grown. In 1974, the couple became Washington residents. They separated in 1976, and plaintiff moved to California, where she has resided ever since. She began divorce proceedings there in 1977. Also in 1977, the defendant retired from the Air Force and has been drawing military retirement since that time.

The defendant, who still resided in Washington, ultimately agreed to a stipulated Interlocutory Decree of Divorce in Sacramento, California, on July 30, 1979, which provided for child custody, a division of community property, no spousal maintenance support, and a requirement that each pay his or her own debts and attorney's fees. This interim decree, with respect to the division of community property, specified:

> "2. DIVISION OF COMMUNITY PROPERTY
>
> B. (1) Respondent (Defendant) shall pay to Petitioner (Plaintiff) a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. Such fraction shall remain constant so that Petitioner (Plaintiff) will receive the benefit of any increases in retirement benefits payable to Respondent (Defendant). Respondent (Defendant) shall notify Petitioner (Plaintiff) the amount of any future increases in military retirement benefits within thirty (30) days from his notification of such increases. Such payments shall commence the month

> next following entry of this judgment and shall be mailed or otherwise made by the fifteenth day of each month. Petitioner (Plaintiff) shall pay taxes on the monies received by her pursuant to this paragraph." (parentheses supplied.)

Defendant did not pay these three-sevenths portion of retirement payments immediately, and apparently the plaintiff inquired of him with respect to this, and he responded that he did not think that the obligation began until the final decree was entered, although he did send some child support during this time. The final judgment of dissolution was entered February 27, 1980, and this judgment incorporated all the provisions of the Interlocutory Decree.

The defendant then began paying the three-sevenths of his military retirement pay as it was received. This amount excluded withholding for income tax.

In April 1980, the defendant

remarried his present wife, Mary Hadley. In August 1981, after the United States Supreme Court decision in McCarty v. McCarty, 453 US 210 (1981), and after conferring with his attorney, the defendant ceased paying any of the retirement to his former wife, the plaintiff, as required by the decree. He did not seek any court authorization for this action. The defendant continually resided here in the state of Washington. In 1982, the defendant and his present wife moved to the state of Mississippi.

Plaintiff attempted to sue the defendant in Fresno County, California, for the failure to pay the retirement pursuant to the divorce decree and also attempted to have some action taken in the state of Washington. She apparently learned of the defendant's whereabouts in Mississippi sometime later, but none of this action was successful. She testifies she simply

did not have the money.

In June 1983, the plaintiff was able to have the retirement payments resumed by contacting the Air Force Financial and Accounting Center in Colorado directly, pursuant to the provisions of the Federal Uniformed Services Former Spouse's Protection Act (10 USC Sec. 1408). The defendant had nothing to do with this procedure.

In September of 1984, the defendant and his present wife returned to the state of Washington and have resided here in Spokane ever since.

In December of 1984, the defendant apparently made claim with the Veterans Administration for a hearing loss and was granted a disability pension, effective January 1985, in the amount of $122 per month. This has reduced his military retirement in the same amount; thus plaintiff has received a proportionately less sum as her share of the military retirement.

In addition, the evidence shows over the years that the defendant has adjusted the amount of exemptions claimed for income tax purposes, and this likewise has affected the total amount of withholding and the resulting retirement that both he and his former wife, the plaintiff, have received. The defendant has collected income tax refunds partly as a result of this utilization of varying claims of exemptions. The plaintiff herself has tried to adjust her tax returns with respect to what apparently the defendant had been receiving as military retirement pay, to the best of her information, and likewise has apparently received income tax refunds on occasions.

In June 1986, the plaintiff filed a certified copy of the Stipulated Interlocutory Judgment here in the Spokane County Superior Court, and in consolidated actions, asks this court

for a clarification as well as modification of this California decree, with respect to retirement as well as disability pay, for damages, for specific performance, for contempt, for a writ of assistance, and attorney's fees.

Recovery is requested against both the defendant, individually, and against the marital community of the defendant and Mrs. Mary Hadley.

The defendants assert laches and the provisions of RCW 26.16.200.

With respect to laches, the Court finds that the evidence simply does not justify its application in this case. The evidence shows that the plaintiff has exercised diligent effort to locate her former husband and to try to enforce the provisions of this divorce decree, but without success. She seems to have done all that was required of her in this regard, and thus there is no laches.

The defendants argue that the provisions of RCW 26.16.200 bars plaintiff's claims. With respect to this statute, by its title, the law deals with both antenuptial as well as separate debts, and the basic thrust of the law is that neither spouse is liable for the separate debts of either, whether they be antenuptial or during the marriage, nor is the community property liable therefor. By an amendment in 1969, the earnings and accumulations of a spouse are available for the satisfaction of debts incurred prior to marriage, but no separate debt, except one for child support or maintenance obligation, may be enforced against the earnings and accumulations of either spouse unless reduced to judgment within three years of the new marriage.

Plaintiff argues that the statute has no application because the failure of the defendant to pay the plaintiff

her share of the military retirement constitutes a tort, committed during the course of the present marriage with his wife, citing authority. The argument is not persuasive.

The essence of plaintiff's claim is for recovery of unpaid installments ordered by the divorce decree and is not in the nature of a tort. It is to enforce the provisions of the California judgment. In Porter v. MacLeod, 15 Wn.App. 650, 553 P.2d 117 (1976), the court dealt with the claim of a present wife to an ownership interest in an insurance policy on her husband's life, the premiums for which were required to be paid pursuant to an earlier divorce decree, for the benefit of a minor child. The husband made such payments during the current marriage. In denying the present wife's claim, the court characterized the husband's obligation as that of an "encumbered spouse" when he entered the

present marriage, Porter 653, and that the monies from the present marriage used to pay the premiums on the policy were used,

> ". . . to pay an antenuptial debt which her husband brought into the marriage. RCW 26.16.200. . ."

Porter 654. The failure to pay the plaintiff's three-sevenths of the military retirement gives rise to no more than a right to collect on a debt, not a tort, and this suit is essentially one to collect that debt. Such an analogy applies here.

Plaintiff argues that the law of the state of California, not Washington, should apply and that under California law, the defendant, individually, and the defendant's community as well are liable and that no statute of limitations, such as RCW 26.16.200, would apply. Plaintiff cites Gamble Robinson Company v. Lapp, 95 Wn.2d 341 (1980), and Pacific States

Cutstone Company v. Goble, 70 Wn.2d 7 (1967). These cases are inapplicable. At all times in this case, the defendant and his wife had no residence in California, but were either residents of Washington or Mississippi. The defendant Edgar Hadley never went to California personally nor resided there during the times in question, and his only connection with the state of California was simply to stipulate to a divorce decree there through his attorney while he was a Washington resident. The defendant community had absolutely no connection with the state of California under the evidence in this case. All of the payments in question here were contemplated as coming from the defendant as a Washington resident.

In cases such as this, in which the creditor is seeking to enforce a foreign judgment, the law of the forum applies with respect to the remedy and

such things as the application of a statute of limitations or other similar bar to the claim. As stated in Colorado National Bank v. Merlino, 35 Wn.App. 610, 668 P.2d 1304 (1983), at 621, it reads:

> "The (foreign) default judgment is entitled to full faith and credit, and is endorceable to the extent allowed under Washington law." (parentheses supplied.)

RCW 6.36.025, as pertinent here, provides:

> "A judgment so filed has the same effect and is subject to the same procedures, defenses, set-offs, counterclaims, cross-complaints, and proceedings for reopening, vacating, or staying as a judgment of a superior court of this state and may be enforced or satisfied in like manner."

16 Am Jur 2d 185, Conflict of Laws, Sec. 118, reads:

> "Matters of procedure, or, as sometimes stated, remedies or remedial rights, are governed by the law of the forum, that is, the law of the place where relief is sought, without regard to domicile of either the plaintiff or the defendant, or of the law of the state or country in which the wrong was committed or the

contract was made or breached."

47 Am Jur 2d 60, Judgments, Sec. 953, reads:

> "As a general rule, a plea of the statute of limitations in an action on a foreign judgment is regarded as one pertaining to the remedy, so that in the absence of a statutory provision to the contrary, the law of the forum, rather than that of the place where the judgment was rendered, will govern in this respect."

The result is that plaintiff's claim for recovery here must be denied. As regards any amounts allegedly not paid during the interim from August 1979, the date of the Interlocutory Decree, to February 1980, the date of the final judgment, the evidence showed that this failure to pay was apparently the result of the intent of the parties that the plaintiff was to obtain the final judgment immediately and the defendant was then to begin his payments from that time on. Additionally, any such delinquency has long since been barred by the

applicable statute of limitations.

As regards the failure to pay during this basic period from August 1981 to June 1983, the provisions of RCW 26.16.200 apply, and plaintiff's claims as to these amounts must be denied.

The Court declines the request of the plaintiff to clarify or modify the California divorce decree with respect to the subject of gross distributable amount versus disposable amount of retirement pay as well as the apparent claim that this Court should divide the disability pay being received by the defendant.

It is to be noted that the language of the California decree was negotiated by plaintiff through her attorney, and no request has ever been made of the California court to take this type of action. The Washington court seems very definitely to be an inappropriate forum for the purpose of

clarifying or modifying in any way the provision of such a California decree, and this Court is not disposed to enter this thicket.

Each party will be responsible for his or her own attorney's fees.

Findings of fact, conclusions of law, and judgment may be entered in accordance with this opinion.

DATED at Spokane this 1st day of April, 1987.

WILLIAM J. GRANT
J U D G E

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

In Re the Marriage of:	
HELEN C. HADLEY, Petitioner, and EDGAR H. HADLEY, Respondent,	COURT'S MEMORANDUM OPINION ON THE APPLICABILITY OF RCW 26.16.200 TO THE ISSUE OF WHETHER JUDGMENT AGAINST DEFENDANT EDGAR H. HADLEY, INDIVIDUALLY, IS APPROPRIATE
HELEN C. HADLEY, Plaintiff, and EDGAR H. HADLEY and MARY HADLEY, individually, and as husband and wife, Defendants.	NO. 82-2-01660-2

After reading and rereading the language of this statute, it is the opinion of the Court that the statute is generally directed toward a limitation of the right to recover on a separate debt against the community earnings and accumulations of either the husband and wife. Though the language of the statute is susceptible

of more than one interpretation, it does not clearly appear to be an absolute bar to recovery against the husband in this case in his separate capacity.

The Court therefore concludes that plaintiff is entitled to judgment against the defendant, Edgar Hadley, in his separate capacity but not against him or the existing marital community, nor against his earnings or accumulations.

The judgment should be for the amount of unpaid retirement due the plaintiff during the period when the defendant, husband, ceased making payments, namely, from 1981 to 1983, plus statutory interest.

If Mr. Benjamin has objection to this decision, he shall have a period of two working days following receipt of this opinion within which to file any written response. The Court will consider any such written response and

notify counsel if there is any change in the conclusions reached herein. If there is no change, Mr. Stier may submit an appropriate revision to the conclusions of law and judgment to be incorporated with the currently proposed findings, etcetera, for signature by the Court. Should the court conclude that there is no basis for the entry of judgment against the defendant, Edgar Hadley, individually, Mr. Benjamin's proposed findings of fact, conclusions of law, and judgment will be signed and entered as they are now proposed.

DATED at Spokane this 18th day of May, 1987.

WILLIAM J. GRANT
J U D G E

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

HELEN C. HADLEY Plaintiff, vs. EDGAR H. HADLEY, individually; and EDGAR H. HADLEY and MARY HADLEY, as husband and wife, Defendants.	82-2-01660-2 and 87-2-00245-9 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER having come on before this Court for trial on March 26, 1987, and being subject to a decision upon reconsideration rendered May 13, 1987; the Defendant/Respondent being represented by GARY H. BENJAMIN of BENJAMIN & PERREY, P.S.; the Plaintiff/Petitioner being represented by JEFFREY D. STIER of TAFT, RIELLY & MACKIN, P.S.; said actions by order of the Court dated March 9, 1987; the Court having heard the testimony of all the parties and argument of counsel, and

being otherwise fully advised in the premises, does make the following:

FINDINGS OF FACT

I.

That the Court has jurisdiction over all parties to this action.

II.

That EDGAR H. HADLEY and HELEN C. HADLEY were married in October, 1950, while Mr. Hadley was in the United States Air Force. They became residents of the State of Washington in 1974. In 1976, a separation occurred and HELEN C. HADLEY did move to the State of California where she has resided continually ever since. HELEN C. HADLEY ultimately commenced divorce proceedings in California in 1977 and EDGAR H. HADLEY did voluntarily submit himself to the jurisdiction of the California court. An interlocutory decree was entered in California on July 30, 1979, which became a final judgment of divorce by action of the

court on February 27, 1980. Both parties were represented by counsel during the negotiation of the final settlement of the divorce proceedings and the interlocutory decree was stipulated to by both parties.

III.

EDGAR H. HADLEY did remain a resident of the State of Washington from 1974 until the Spring of 1982, when he moved to the State of Mississippi with his new wife, MARY HADLEY. EDGAR H. HADLEY and MARY HADLEY were married in April, 1980, and have been so married ever since. EDGAR H. HADLEY and MARY HADLEY did remain in the State of Mississippi until they moved back to the State of Washington in the Spring of 1984. EDGAR H. HADLEY and MARY HADLEY have remained continuously in the State of Washington ever since. EDGAR H. HADLEY was a resident of the State of Mississippi with the intent to remain a resident

thereof during the period of time that he remained in that state.

IV.

That the interlocutory decree between EDGAR H. HADLEY and HELEN C. HADLEY provided for child support and custody, a division of community property, spousal maintenance, division of debts and attorney's fees. The final decree incorporated all provisions of the interlocutory decree, and provided in pertinent part:

> 2. DIVISION OF COMMUNITY PROPERTY.
>
> B.(1). Respondent (Defendant) shall pay to Petitioner (Plaintiff) a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. Such fraction shall remain constant so that Petitioner (Plaintiff) will receive the benefit of of [sic] any increases in retirement benefits payable to Respondent (Defendant)... Such payments shall commence the month next following the entry of this judgment and shall be mailed or otherwise made

> by by [sic] the 15th day of each month. Petitioner (P]aintiff) shall pay taxes on the monies received by her pursuant to this paragraph. (Bracketed material added).

V.

That Mr. Hadley did not pay the 3/7 portion of the military retirement pay to HELEN C. HADLEY immediately and failed to do so until the month following entry of the final decree. The Court finds by the testimony that it was the intent of the parties that HELEN C. HADLEY was to obtain a final judgment immediately and that EDGAR H. HADLEY was to commence payments thereafter; that HELEN C. HADLEY did not, in fact, immediately enter the final judgment and that once final judgment was entered, EDGAR H. HADLEY did begin payment in compliance with the decree, excluding those sums withheld for Federal income tax.

VI.

EDGAR H. HADLEY did cease paying any portion of his military retirement pay to HELEN C. HADLEY commencing August, 1981, after conferring with counsel regarding the effect of the United States Supreme Court decision in McCarty v. McCarty, 553 [sic] U.S. 210 (1981). EDGAR H. HADLEY did not seek any Court authorization to cease his payments of the military retirement pay.

VII.

In June, 1983, HELEN C. HADLEY was able to obtain resumption of payment of the 3/7 portion of the retirement monies pursuant to the provisions of the newly enacted Federal Uniform Services Former Spouses Protection Act (10 U.S.C. 1408), and has received such payments continually since. EDGAR H. HADLEY had nothing to do with the resumption of payments. The payments from June, 1983, and thereafter, were

in the amount of 3/7 of the net disposable retirement portion of EDGAR H. HADLEY after deduction of taxes withheld from the same.

VIII.

That in 1984, EDGAR H. HADLEY did seek medical attention through the Veterans Administration which resulted in the award of a disability pension effective with payments beginning in January, 1985. Such payments did reduce the amount of military retired pay dollar-for-dollar, resulting in a reduction in HELEN C. HADLEY's allocation of 3/7 of the military retirement pay.

IX.

HELEN C. HADLEY did unsuccessfully attempt to bring contempt of court proceedings against EDGAR H. HADLEY in Fresno County, California in 1982. HELEN C. HADLEY did also bring an action in Washington in 1982, but was unable to obtain service upon EDGAR H.

HADLEY in either proceeding. HELEN C. HADLEY was aware of EDGAR H. HADLEY's whereabouts in the State of Mississippi while he resided there, but she did not attempt to pursue the matter there, apparently for lack of funds.

X.

The total military retirement monies from August 1981 through June, 1983, were used by EDGAR H. HADLEY for the purposes of his present community. EDGAR H. HADLEY has not brought evidence before this Court satisfactorily tracing the use of those monies to any separate expenses or enterprises.

XI.

EDGAR H. HADLEY has readjusted the amount of withholding by claiming less exemptions on several occasions over the years, which has resulted in some fluctuation of the corresponding amounts paid to HELEN C. HADLEY. This Court makes no finding as to the

appropriateness of either party's tax filings.

XII.

That in June, 1986, HELEN C. HADLEY did file a certified copy of the stipulated interlocutory judgment and the final judgment of divorce as obtained as hereinbefore mentioned in Spokane County, seeking clarification and modification as to the military retired pay and disability pay, and seeking damages, specific performance, contempt, a writ of assistance, and attorney's fees therein.

BASED UPON the foregoing FINDINGS OF FACT, this Court does hereby enter the following

CONCLUSIONS OF LAW

I.

The Court has jurisdiction over the parties and the subject matter of this action.

II.

That this action does not sound in

tort, but is in the nature of the collection of an alleged debt in the enforcement of a foreign judgment.

III.

The McCarty decision did not relieve EDGAR H. HADLEY from his prospective obligation to pay the monthly 3/7 portion of his military retirement pay to the Plaintiff without any attempt to modify or amend the Decree of Dissolution of Marriage.

IV.

That Washington law applies to this enforcement proceeding as the law of the forum where an enforcement is sought pursuant to RCW 6.36.025; 47 Am.Jur. 2d 60, Judgments, Paragraph 953; 47 Am.Jur. 2d 185, Conflicts of Law, Section 118; Colorado National Bank v. Merlino, 35 WA App. 610, 621 (1983).

V.

That RCW 26.16.200 and the intent of the party's original contract and

the stipulated interlocutory decree bars Plaintiff's claim against the community of EDGAR H. HADLEY and MARY HADLEY for the period of non-payment of military retirement pay to the Plaintiff by EDGAR H. HADLEY.

VI.

That EDGAR H. HADLEY entered into his present marriage to MARY HADLEY as an encumbered spouse as defined in Porter v. MacLeod, 15 WA App. 650 (1976), and that the claims herein sued for are antenupital debts brought into the present marriage of Mr. Hadley and that the present community of the Defendants has absolutely no liability in this action.

VII.

That RCW 26.16.200 and the intent of the party's original contract and the stipulated interlocutory decree bars Plaintiff's claim for the period of August 1979 to February 1980.

VIII.

That the separate estate of EDGAR H. HADLEY should be liable for judgment in the amount of $11,452.00 in behalf of Plaintiff, representing unpaid installments of military retirement pay accruing from April, 1981, through May, 1983. Said judgment should bear interest at the statutory rate against each unpaid installment of the obligation.

IX.

Plaintiff/Petitioner should have her claim for damages caused alleging manipulation of the amount of disposable pay denied.

X.

That, as the decree as originally entered, is not ambiguous and reflects the intent of the parties, said decree should not be modified or otherwise altered by this court. Specifically, the Court should not clarify said decree to delineate the number of

exemptions Respondent should claim as affecting his disposable retirement pay, nor should the Court consider clairifying or amending the decree to vest Plaintiff/Petitioner with a 3/7 share of Respondent's disability pay.

XI.

That Plaintiff's claim was brought in good faith and is thereby not frivolous.

XII.

That Defendant's acts and actions were done in good faith and he is thereby not in contempt of court.

XIII.

That the bar of Plaintiff's claim for clarification or modification renders specific performance or writ of assistance moot and they thereby are denied.

XIV.

That the Plaintiff's claim for unjust enrichment against the community of EDGAR H. HADLEY and MARY HADLEY is

barred by the three year statute of limitations.

XV.

That each party should bear their own attorney's fees and costs in the present action.

DATED this 20 day of August, 1987.

WILLIAM J. GRANT
JUDGE

JUDGMENT

THIS COURT, having entered its Findings of Fact and Conclusions of Law herein and being otherwise fully advised in the premises, does hereby ORDER, ADJUDGE AND DECREE as follows:

1. All of Petitioner/Plaintiff's claims against the community of EDGAR H. HADLEY and MARY HADLEY hereby are denied in all respects and she should take nothing thereby;

2. Plaintiff/Petitioner is hereby granted a judgment against EDGAR H. HADLEY, individually, in the amount of $11,452.00 and interest accrued upon

that sum at the statutory rate from the date of each unpaid installment accrued between August, 1981 and May, 1983;

3. All other claims of Petitioner/Plaintiff against EDGAR H. HADLEY are hereby denied in all respects and she should take nothing thereby;

4. Respondent's/Defendant's counterclaim herein are denied and he should take nothing thereby;

5. Each party should bear their own costs and attorney's fees in this matter.

DONE IN OPEN COURT this 20 day of August, 1987.

WILLIAM J. GRANT
William J. Grant, Judge

Presented by:

/s/
Jeffrey D. Stier
Attorney for Petitioner/Plaintiff

Copy received; Notice of Presentment waived:

By:/s/
GARY H. BENJAMIN
Attorney for Respondent/Defendant

IN THE SUPERIOR COURT OF THE STATE

OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

HELEN C. HADLEY Plaintiff, vs. EDGAR H. HADLEY, individually; and EDGAR H. HADLEY and MARY HADLEY, as hus- band and wife, Defendants.	82-2-01660-2 and 87-2-00245-9 ADDENDUM TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER having come regularly before this Court for trial on March 26, 1987, and being subject to a decision upon reconsideration rendered May 13, 1987, the Petitioner/Plaintiff being represented by JEFFREY D. STIER of TAFT, REILLY & MACKIN, P.S., and Respondent/Defendants being represent by GARY H. BENJAMIN of BENJAMIN & PERREY, P.S., said actions being heard together after consolidation of those actions by order of the Court dated March 9, 1987, the Court having heard the testimony of all parties and the

argument of counsel, and being otherwise fully advised in the premises, makes the following ammendment [sic] to the FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT entered herein.

I.

CONCLUSION OF LAW VIII

Conclusion of Law VIII, as delineated on page seven (7) of said Findings of Fact, Conclusions of Law and Judgment, is ammended [sic] to read as follows:

> That the separate estate of EDGAR H. HADLEY, as it existed prior to his current marriage, or as it may thereafter be separately obtained, but excluding any and all community earnings or community property of EDGAR H. HADLEY'S current marriage to MARY HADLEY, should be liable for judgment in the amount of $11,452.00 in behalf of Petitioner/Plaintiff, such sum representing unpaid installments of military retirement pay accruing from April, 1981, through Mat, [sic] 1983. Said judgment should bear interest at the statutory rate against each unpaid installment of the obligation.

II.

JUDGMENT 2

Judgment 2 as delineated on page nine (9) of said Findings of Fact, Conclusions of Law and Judgment, is ammended [sic] to read as follows:

> Plaintiff/Petitioner is hereby granted a judgment against EDGAR H. HADLEY, individually and as limited in the foregoing Conclusions of Law at paragraph VIII thereof as ammended [sic] above, in the amount of $11,452.00 and interest accured upon that sum at the statutory rate from the date of each unpaid installment accrued between August, 1981 and May, 1983;

DONE IN OPEN COURT this 20 day of August, 1987.

WILLIAM J. GRANT
WILLIAM J. GRANT, JUDGE

Presented by:

/s/
GARY H. BENJAMIN
Attorney for Respondent/Defendants

Approved as to form and content,
notice of presentment waived:

/s/
JEFFREY D. STIER
Attorney for Petitioner/Plaintiff

APPENDIX E

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

In Re the Marriage of:	)	No. 8849-9-III
HELEN C. HADLEY, Appellant,	)	
and	)	Division Three Panel Two
EDGAR H. HADLEY, Respondent.	)	Filed JAN 31 1989

GREEN, J.--On July 30, 1979, in Sacramento, California, Helen Hadley obtained a stipulated interlocutory judgment dissolving her marriage to Edgar Hadley, a Washington resident. On February 27, 1980, a final judgment was entered. In June 1982, Mrs. Hadley filed certified copies of these documents in Spokane County and then initiated this action to recover amounts due and unpaid under the judgment and to clarify one of its provisions. The trial court allowed a recovery of part of the claimed amounts due, but declined to clarify the decree. She appeals.

Since no error has been assigned to the court's findings of facts, they become verities. In re Marriage of Babbitt, 50 Wn. App. 190, 192, 747 P.2d 507 (1987). Those findings show that Mr. and Mrs. Hadley were married in 1950 while Mr. Hadley was in the United States Air Force. They became residents of this state in 1974. In 1976, they separated and Mrs. Hadley moved to California where she continues to reside. In 1977, she instituted divorce proceedings in that state. Mr. Hadley voluntarily submitted to jurisdiction. Thereafter, the interlocutory and final judgments dissolving the Hadleys' marriage were entered.

The stipulated interlocutory judgment contained the following provision which was affirmed by the final judgment:

> 2. DIVISION OF
> COMMUNITY PROPERTY
>
> . . .

> B. (1) Respondent shall pay to Petitioner a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. Such fraction shall remain constant so that Petitioner will receive the benefit of any increases in retirement benefits payable to Respondent. Respondent shall notify Petitioner the amount of any future increases in military retirement benefits within thirty (30) days from his notification of such increases. Such payments shall commence the month next following entry of this judgment and shall be mailed or otherwise made by the fifteenth day of each month. Petitioner shall pay taxes on the monies received by her pursuant to this paragraph.

The court found that the parties intended Mrs. Hadley would immediately obtain a final judgment, triggering payment by Mr. Hadley. She did not do so, however, until February 27, 1980. One month after the final judgment of dissolution was entered, Mr. Hadley began making payments of three-sevenths of the net retirement after deducting his withholding tax.

After the decision in McCarty v. McCarty, 453 U.S. 210, 69 L. Ed. 2d

589, 101 S. Ct. 2728 (1981), Mr. Hadley, without authorization of the court, ceased making his payment. In June 1983, Mrs. Hadley, without the assistance of Mr. Hadley, obtained a resumption of those payments pursuant to the federal Uniform Services Former Spouses' Protection Act (10 U.S.C. Sec. 1408). The payments were for three-sevenths of the net retirement after deducting Mr. Hadley's withholding tax. Over the years, Mr. Hadley "re-adjusted his exemptions" which affected the amount of the withholding tax and caused a fluctuation in the amounts paid to Mrs. Hadley. The court declined to rule on the appropriateness of either party's tax filings.

In 1984, Mr. Hadley sought medical attention through the Veterans Administration which resulted in a disability pension. The amount of the pension reduced the amount of his

military retirement and in turn reduced the payment to Mrs. Hadley.

On these facts, the court concluded the McCarty decision did not relieve Mr. Hadley of his obligation to pay Mrs. Hadley three-sevenths of his military retirement. According to the court, she was entitled to recover $11,452 for payments accruing during the period April 1981 through May 1983. However, the court concluded Mrs. Hadley could only recover this judgment from Mr. Hadley's separate estate. Any recovery from his one-half of the community property of his second marriage was barred by the provisions of RCW 26.16.200. The court concluded this statute, the intent of the parties and the interlocutory decree barred any claim for the period between August 1979 and February 1980--the period between the interlocutory and final judgments.

First, Mrs. Hadley contends the

court erred in concluding she was barred by reason of RCW 26.16.200 from recovering her judgment against Mr. Hadley's one-half of the community property of his second marriage. We agree.

RCW 26.16.200 provides in part:

> Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: Provided, That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section, neither the husband nor the wife shall be construed to have any interest in the earnings of the other: Provided further, That no separate debt, except a child support or maintenance obligation, may be the basis of a claim against the earnings and and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties.

(Italics ours.) The question is whether Mrs. Hadley's claim was reduced to judgment within 3 years of Mr. Hadley's remarriage.

The record shows the final judgment dissolving the Hadleys' marriage was entered in California on February 27, 1980. Mr. Hadley remarried in April 1980. A certified copy of the California interlocutory and final judgments were filed in Spokane County on June 4, 1982, in compliance with the Uniform Enforcement of Foreign Judgments Act, RCW 6.36. RCW 6.36.025 provides:

> A copy of any foreign judgment authenticated in accordance with the act of congress or the statutes of any superior court of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the superior court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, set-offs, counterclaims, cross-complaints, and proceedings for reopening, vacating, or staying as a judgment of a superior court of this state and may be enforced or satisfied in like manner.

(Italics ours.) Thus, the California judgment between Mr. and Mrs. Hadley was entitled to full faith and credit in this state absent any showing California did not have jurisdiction over the parties or the subject matter. State v. Vestal, 43 Wn.App. 663, 667, 719 P.2d 163 (1986); see 15 L. Orland & K. Tegland, Wash. Prac., Trial Practice Sec. 392 (4th ed. 1986). Here, no such showing was made. In light of this record, it is clear the California judgment became a valid Washington judgment within 3 years of Mr. Hadley's remarriage.

We do not accept the position the statute barred recovery because Mr. Hadley's defaults had not been reduced to judgment within 3 years. The award of three-sevenths of Mr. Hadley's retirement pay was a property division that was fully adjudicated in the California judgments which were "reduced to judgment" in this state

upon their filing in Spokane County. This filing occurred well within 3 years of Mr. Hadley's remarriage. Mrs. Hadley's action was brought to enforce the provisions of that judgment. Thus, the court erred in holding RCW 26.16.200 barred any recovery by Mrs. Hadley against Mr. Hadley's one-half of the community property of his second marriage.

Mr. Hadley's reference to the 6-year general statute of limitation, RCW 4.16.040, as it applies to bar recovery of alimony and support, is not applicable here. The California court divided property -- Mr. Hadley's retirement proceeds -- on February 27, 1980 in California. That division became a judgment entitled to full faith and credit when it was filed in Spokane County on June 4, 1982 and was enforceable by the courts of this state.

Second, Mrs. Hadley contends the

court erred when it declined to construe the provision of the interlocutory decree dividing Mr. Hadley's military pay. That provision provided:

> [Mr. Hadley] shall pay to [Mrs. Hadley] a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. . . . [Mrs. Hadley] shall pay taxes on the monies received by her pursuant to this paragraph.

The provision also stated Mrs. Hadley would receive the benefit of any increases in retirement benefits payable to Mr. Hadley.

With respect to Mrs. Hadley's request for clarification, the trial court concluded:

> That, as the decree as originally entered, is not ambiguous and reflects the intent of the parties, said decree should not be modified or otherwise altered by this court. Specifically, the Court should not clarify said decree to delineate the number of exemptions [Mr. Hadley] should claim as affecting his disposable retirement pay, nor should the Court consider clarifying or amending the decree to vest [Mrs. Hadley] with a 3/7 share of [Mr. Hadley's] disability

pay.

In so doing, we find the court erred. Although each party held contrary views of the intent of the provision, it is evident Mrs. Hadley was to receive three-sevenths of the gross amount of Mr. Hadley's retirement. To rule otherwise permits Mr. Hadley to unilaterally control the amount Mrs. Hadley receives and to ignore the California court's division of property.

The record indicates Mr. Hadley subsequently reduced his claimed exemptions and thus increased the amount of taxes to be withheld from his retirement benefit. While this action by Mr. Hadley had a direct effect of reducing the amount received by Mrs. Hadley, the record shows he in turn received a tax refund. It is apparent from a reading of the entire provision that each party was to pay their respective income taxes on the portion

each received. To carry out the parties' intent, the three-sevenths share awarded to Mrs. Hadley must be computed on the gross amount of Mr. Hadley's retirement pay.

Third, Mrs. Hadley contends the court erred in not clarifying the effect of the disability award received by Mr. Hadley on her share of his retirement pay. The record reflects Mr. Hadley's disability award of $122 per month reduced his military pay by that amount. Thus, the total amount he received remained the same, although a portion of the pay was disignated for disability. Mrs. Hadley contends she is entitled to three-sevenths of the total retirement and disability pay.

The stipulated interlocutory judgment and the final judgment do not address the question of disability payments. They refer only to the amount to be received by Mr. Hadley as retirement pay. Clearly, a disability

award is not retirement pay. Adding such a term would require us to write a new agreement for the parties. We are not permitted to do so. In re Marriage of Mudgett, 41 Wn.App. 337, 341, 704 P.2d 169 (1985). Consequently, notwithstanding that the total sum received by Mr. Hadley remains the same, by the terms of the judgment Mrs. Hadley is only entitled to recover three-sevenths of his "military retirement pay."

Mrs. Hadley also contends the court erred in refusing to allow her a recovery for military retirement pay between the interlocutory and the final decree. We agree. With respect to the payment of three-sevenths of his military retirement pay, the stipulated interlocutory judgment signed by both parties provided that "[s]uch payments shall commence the month next following entry of this judgment . . ." (Italics ours.) While ordinarily payments under

an interlocutory decree would not be effective until the expiration of the interlocutory period and the entry of a final judgment or decree, In re Williams' Estate, 36 Cal.2d 289, 223 P.2d 248, 251, 22 A.L.R.2d 716 (1950), when the parties agree to commence payments at a prior date, that agreement is effective and controlling. Consequently, Mrs. Hadley is entitled to recover her three-sevenths share of the gross military retirement pay that should have been paid commencing within 1 month following entry of the interlocutory decree from Mr. Hadley's share of the community property of the new marriage. RCW 26.16.200.

Each party shall bear their own attorney fees and costs on appeal.

Reversed and remanded for revision of the judgment in accordance with this opinion.

A majority of the panel had determined that this opinion will not

be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

/s/ _____

WE CONCUR:

/s/ _____

/s/ _____

APPENDIX F

THE SUPREME COURT OF WASHINGTON

In Re the Marriage of:	No. 55994-5
HELEN C. HADLEY, Respondent, and EDGAR H. HADLEY, Petitioner.	ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW AND DENYING PETITION FOR REVIEW

This matter come on before the Court on its May 9, 1989, Motion Calendar on Petitioner's Motion for Extension of Time to File Petition for Review. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion for Extension of Time to File Petition for Review is granted and the Petition for Review is denied on the merits.

DATED at Olympia, Washington this 9th day of May, 1989.

/s/
CHIEF JUSTICE

APPENDIX G

TITLE 10 U.S.C.

Sec. 101. Definitions

In addition to the definitions in section 1-5 of title 1[1 USC sub.sec. 1-5], the following definitions apply in this title [10 USC sub.sec. 101 et seq.]: . . .

(27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

. . .

Sec. 267. Ready Reserve; Standby Reserve; Retired Reserve; placement and status of members

(a) There are in each armed force a Ready Reserve, a Standby Reserve, and a Retired Reserve. Each Reserve shall be placed in one of those categories.

(b) Reserves who are on the inactive status list of a reserve component, or who are assigned to the inactive Army National Guard or the inactive Air

National Guard, are in an inactive status. Members in the Retired Reserve are in a retired status. All other Reserves are in an active status.

(Aug. 10, 1956, ch 1041, sec. 1, 70A Stat. 12.)

Sec. 276. Mobilization forces: maintenance

(a) Whenever units or members of the reserve components are ordered to active duty (other than for training) during a period of partial mobilization, the Secretary concerned shall continue to maintain mobilization forces by planning and budgeting for the continued organization and training of the reserve components not mobilized, and make the fullest practicable use of the Federal facilities vacated by mobilized units, consistent with approved joint mobilization plans.

(b) In this section "partial mobilization" means the mobilization

resulting from action by Congress or the President, under any law, to bring units of any reserve component, and members not assigned to units organized to serve as units, to active duty for a limited expansion of the active armed forces.

(Aug. 10, 1956, ch 1041, sec. 1, 70A Stat. 13.)

APPENDIX H

Sec. 672. Reserve components generally

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However-

(1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the

Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available; and

(2) a member of the Standby Reserve may not be ordered to active duty under this subsection unless the Director of Selective Service determines that the member is available for active duty.

. . .

(c) So far as practicable, during any expansion of the active armed forces that requires that units and members of the reserve components be ordered to active duty (other than for training), members of units organized and trained to serve as units who are ordered to that duty without their consent shall be so ordered with their units. However, members of those units may be

reassigned after being ordered to active duty (other than for training).

Sec. 688. Retired members

(a) Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps, a member of the Retired Reserve who has completed at least 20 years of active service, or a member of the Fleet Reserve or Fleet Marine Corps Reserve may be ordered to active duty by the Secretary of the military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

. . .

APPENDIX I

TITLE 10 U.S.C.

Sec. 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28 [28 USCS sec. 451]) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement

requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which-

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for-

(i) payment of child support (as defined in section 462(b)

of the Social Security Act (42 U.S.C. 662(b)) [42 USCS sec. 662(b)]);

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)) [42 USCS sec. 662(c)]); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for

taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title [10 USCS sub.sec. 1201 et seq.]) less amounts which-

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive

compensation under title 5 or title 38 [5 USCS sub.sec. 101 et seq.; 38 USCS sub.sec. 101 et seq.];

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) [26 USCS sec. 3402(i)] if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for

supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title [10 USCS sub.sec. 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section-

(1) service of a court order is effective if-

(A) an appropriate agent of the Secretary concerned designated

for receipt of service court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) [50 USCS appx sub.sec. 501

et seq.] were observed; and

(2) a court order is regular on its face if the order-

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold,

assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposal retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on

the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the

effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligiblity for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from

the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the

disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective

service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall-

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such courts orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of

disposable retired or retainer pay that is equal to the lesser of-

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the

amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus-

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The secretary concerned

shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659], both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from

the retired or retainer pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to

section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659] with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 659], provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be

considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means

available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS sec. 649] in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under

regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Sept. 8, 1982, P.L. 97-252, Title X, Sec. 1002(a), 96 Stat. 730;

Oct. 19, 1984, P.L. 98-525, Title VI, Part E, Sec. 643(a)-(d), 98 Stat. 2547.)

APPENDIX J

Title 29 U.S.C.

Ch. 18 RETIREMENT INCOME SECURITY

Section 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained-

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if-

(1) such plan is a governmental plan (as defined in

section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workman's compensation laws or unemployment compensation or disability insurance laws;

Section 1002.

. . .

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental

plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 [45 U.S.C.A. Sec. 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. Sec. 288 et seq.].

APPENDIX K

REVISED CODE OF WASHINGTON

6.15.020. Pension money exempt

(1) Unless otherwise provided by federal law, any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever, and when a debtor dies, or absconds, and leaves his or her family any money exempted by this section, the same shall be exempt to the family as provied in this section.

(2) The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of

Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, or seizure by or under any leal process whatever: Provided, That this subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order (as such term is defined in section 206(d) of the federal employee retirement income security act of 1974, as amended, 29 U.S.C. Sec. 1056(d) or in section 401(a)(13) of the internal revenue code of 1954, as amended).

(3) For the purposes of this section, the term "employee benefit plan" means any plan or arrangement that is subject to the provisions of the federal employee retirement income security act of 1974, as amended, 29

U.S.C. Secs. 1001 through 1461 or that is described in sections 401(a), 403(a), 403(b), 408, or 409 (as in effect before January 1, 1984) of the internal revenue code of 1954, as amended, or both: Provided, That the term "employee benefit plan" shall not include any employee benefit plan that is excluded from the application of the federal employee retirement income security act of 1974, as amended, pursuant to section 4(b)(1) of that act, 29 U.S.C. Sec. 1003(b)(1).

Formerly Sec. 6.16.030, amended by Laws 1987, ch. 64, Sec. 1. Recodified as Sec. 6.15.020 and amended by Laws 1987, ch. 442, Sub.Sec. 302, 1121. Reenacted and amended by Laws 1988, ch. 231, Sec. 6, eff. March 23, 1988.

26.16.140. Earnings and accumulations of husband and wife living apart, minor children

When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The

earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living.

Enacted by Code 1881, Sec. 2413. Amended by Laws 1972, Ex.Sess., ch. 108, Sec. 5.

26.16.200. Antenuptial and separate debts, liability for - Child support obligation, liability for

Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: Provided, That the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to marriage, and the earnings and accumulations of the

wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section, neither the husband nor the wife shall be construed to have any interest in the earnings of the other: Provided further, That no separate debt, except a child support or maintenance obligation, may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties. The obligation of a parent or stepparent to support a child may be collected out of the parent's or stepparent's separate property, the parent's or stepparent's earnings and accumulations, and the parent's or stepparent's share of community personal and real property. Funds in a community bank account which can be identified as the earnings of

the nonobligated spouse are exempt from satisfaction of the child support obligation of the debtor spouse.

Enacted by Code 1881, Sec. 2405. Amended by Laws 1969, Ex.Sess., ch. 121, Sec. 1; Laws 1983, 1st Ex.Sess., ch. 41, Sec. 2.

APPENDIX L

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 8. Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix

the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progrss of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to

exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And

To make all Laws- which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. Limitations upon powers of Congress

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of

Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to

time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. Restrictions upon powers of states

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

. . .

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ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

. . .

AMENDMENTS

Amendment [V.] Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIII.

Section 1. Slavery abolished

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Enforcement

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

Section 1. Citizenship rights not to be abridged by states

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 4. What public debts are void

The validity of the public debt of

the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. Power to enforce article

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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Supreme Court, U.S.
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(2)

No. 89-238

In The

Supreme Court of the United States

October Term, 1989

EDGAR H. HADLEY,

Petitioner,

v.

HELEN C. HADLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

STANLEY A. KEMPNER, JR.
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QUESTIONS PRESENTED

I. Whether the Uniformed Services Former Spouse Protection Act (10 U.S.C. §1408) [FSPA] is an impermissible delegation of exclusive Congressional authority and responsibility, in violation of the United States Constitution, Article 1, Section 8, and as such is therefor unconstitutional?

II. Whether the FSPA, if constitutionally valid on its face, permits the Washington state courts to recharacterize the nature of Military Retired/Retainer pay as a property interest, contrary to section (c) (2) of that Act and decision of this Court?

III. Whether the FSPA, if constitutionally valid on its face, is unconstitutionality interpreted and applied by the Washington state courts, in violation of the due process clause, the contractual impairments clause and the Thirteenth Amendment of the United States Constitution?

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No. 89-238

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Respondent Helen Hadley, by and through her counsel of record, respectfully presents this Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.

I.

STATEMENT OF FACTS

The parties entered into a stipulated interlocutory judgment dissolving their marriage[1] on July 20, 1979. The Judgment was entered into in Sacramento, California. Mrs. Hadley was a California resident and Mr. Hadley was a Washington resident. A final judgment was entered on February 27, 1980. The stipulated interlocutory judgment contained a provision which divided the parties community property.

> B. (1) Respondent shall pay to Petitioner a sum equal to three-sevenths (3/7) of all amounts he receives monthly as and for his military retirement pay. Such fraction shall remain constant so that Petitioner will receive the benefit of any increases in retirement benefits payable to Respondent. Respondent shall notify Petitioner the amount of any future increases in military retirement benefits within thirty days (30) days from his notification of such increases. Such payments shall commence the

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[1] The parties married in 1950 and became residents of Washington in 1974. Mrs. Hadley moved to California after their separation in 1976. Divorce proceedings were instituted in California in 1977 with Mr. Hadley submitting to the jurisdiction of the court.

> month next following entry of this judgment and shall be mailed or otherwise made by the fifteenth day of each month. Petitioner shall pay taxes on the monies received by her pursuant to this paragraph.

Mr. Hadley did not begin making payments to Mrs. Hadley until after entry of the final judgment on February 27, 1980. Mr. Hadley ceased making payments after the decision in *McCarty v. McCarty*, 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981). Payments did not resume until Mrs. Hadley obtained resumption of payments under the Federal Uniform Services Former Spouses' Protection Act (10 U.S.C. §1408). Over time Mr. Hadley manipulated his withholding exemptions causing reduction of Mrs. Hadley's share of the military pension.

In 1984 Mr. Hadley's military pension was reduced after Mr. Hadley was awarded a disability pension, resulting in a reduced payment to Mrs. Hadley beyond that caused by Mr. Hadley's manipulation of the withholding tax amounts.

Mrs. Hadley filed the 1980 judgment in the Superior Court of Spokane County, State of Washington on June 4, 1982, and sought, among other things, enforcement of the terms of the

judgment[2] and the court to construe a provision of the interlocutory decree.

The trial court (Spokane County Superior Court, State of Washington) awarded Mrs. Hadley a judgment against Mr. Hadley individually, in the amount of $11,452.00 for "unpaid installments of military retirement pay accruing from April, 1981 through March, 1983."

Mrs. Hadley appealed to the Washington Court of Appeals, Division III, contending that: 1) the trial erred in concluding she was barred by RCW 26.16.200 from recovering her judgment against Mr. Hadley's one-half of the community property of his second marriage; 2) the court erred in not computing the amount she was owed in unpaid retirement pay installments using the gross amount of Mr. Hadley's retirement pay; 3) The court erred in refusing to allow her a recovery for military retirement pay between the interlocutory and the final decree; and 4) that the court erred in not clarifying the decree to allow her to receive 3/7ths of the total retirement and disability pay. The state appeals court found the trial court erred

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[2] Mrs. Hadley sought recovery of her portion of retirement payments during the period between April 1981 through May 1983 when Mr. Hadley stopped making the retirement payments after the *McCarty* decision. She further sought recovery of her portion of the retirement payments between the time of the filing of the California interlocutory and final judgments, as well as a clarification by the court whether or not she was entitled to 3/7ths of the total retirement and disability pay Mr. Hadley was receiving.

in all but the issue of Mrs. Hadley's entitlement to 3/7ths of the total retirement and disability pay.

Mr. Hadley moved for a Petition for Review by the Washington State Supreme Court, which was denied on the merits.

II.

REASONS WHY THE PETITION SHOULD BE DENIED

A. THE WASHINGTON COURT CORRECTLY ENFORCED THE CALIFORNIA JUDGMENT AGAINST PETITIONER.

1. The *McCarty* decision does not invalidate the Hadley's divorce decree.

The final judgment dissolving the Hadley's marriage was entered with the court on February 27, 1980. This court's *McCarty v McCarty*, 453 U.S. 210, 101 S.Ct 2728, 69 L.Ed.2d 589 (1981) decision was issued in 1981. Petitioner's argument suggests that *McCarty* should be applied retroactively thereby invalidating the parties' pre *McCarty* decree, leaving 10 USC §1408 to restore the divorce decree. Arguments similar to this have been raised repeatedly in state and federal courts and have been repeatedly rejected. *Wilson v. Wilson*, 667 F.2d 497, 499 (5th Cir.), cert. denied, 458 U.S. 1107, 102 S.Ct. 3485, 73 L.Ed2d 1368 (1982; *Segrest v. Segrest*, 649 S.W. 2d 610, 613 (Tex. 1983), cert. denied, 464 U.S. 894, 104 S.Ct.

242, 78 L.Ed.2d 232 (1983); *In the Matter of the Marriage of Brown*, 98 Wn.2d 46. 653 P.2d 602 (1982) (retroactive application of *McCarty*). 10 USC §1408, rather than restoring the Hadley's decree, merely implements its terms.

2. Petitioner lacks the standing to challenge the constitutionality of 10 USC §1408.

Petitioner lacks the requisite standing to challenge the constitutionality of 10 USC §1408. The case of *Goad v. U.S.*, 661 F.Supp. 1073 (S.D.Tex. 1987), affirmed 837 F.2d 1096, cert. denied, 108 S.Ct. 1079, 99 L.Ed 2d 238, is four square on the issue of the constitutionality issue presented by this Petitioner.

The *Goad* case also involved a pre *McCarty* divorce decree. In the decree Mrs. Goad was granted 12/27th of Mr. Goad's military retirement. As in the instant case Mr. Goad refused to pay Mrs. Goad her share of the military retirement after *McCarty*. After passage of 10 USC §1408 Mrs. Goad applied for the withholding of the court ordered amount. Mr. Goad then brought an action in United States District Court, alleging, among other things, that 10 USC §1408 was an impermissible delegation of legislative power to the states, deprived him of due process and was a denial of equal protection.

The court in considering the government's motion to dismiss, found that Mr. Goad lacked the requisite standing to challenge the constitutionality

of 10 USC §1408. In so doing the court stated at page 1080:

> Because *McCarty* is not retroactive, the divorce decree dividing Mr. Goad's military retirement pay has always remained valid. Thus the FSPA (10 USC §1408), insofar as it sanctions such divisions, had no effect on Mr. Goad. The FSPA only affects Mr. Goad insofar as it permits the direct withhold of Mr. Goad's funds. Mr. Goad has standing only to assert claims relating to that withholding. He cannot challenge the Act's constitutionality insofar as it permits states to consider military retirement benefits as divisible community property, because the division of retirement benefits by his decree always remained valid. Implementation of the FSPA does not affect or injure him. *Heckler v. Matthews*, 46 U.S. 728, 738, 104 S.CT. 1387, 1394-95, 79 L.Ed.2d 646 (1984). (Emphasis added)

For the same reasons elucidated by the *Goad* court, this Petitioner lacks the requisite standing to challenge the constitutionality of 10 USC §1408.

Beyond the issue of standing, the *Goad* court addressed the merit of Mr. Goad's claim that 10 USC §1408 was an impermissible delegation of

authority to state courts to make laws or rules regarding military pay. The *Goad* court at page 1080 stated:

> The Act (10 USC §1408) merely allows the state courts to consider military retirement pay when making property divisions under their own laws. Congress retains the power to exclude any and all divisions of military retirement pay.

The issues raised by Petitioner have been considered in one form or another by this Court and decided adversely to Petitioner's position. Accordingly, there is no basis for granting the petition.

3. The Washington Courts did not redefine or recharacterize the nature of retired military compensation paid to Mr. Hadley.

The Courts of the State of Washington did not recharacterize Mr. Hadley's retired military compensation. The Washington courts merely enforced the 1980 California judgment between Mr. and Mrs. Hadley, affording it full faith and credit in the State of Washington. Petitioner made no showing in any proceedings in the State of Washington that the characterization of the property involved in the California judgment was invalid or impermissible or that there was a lack of jurisdiction over the parties or subject matter by the California court, therefore rendering the California

judgment valid and resultingly a valid Washington judgment. *State v. Vestal*, 43 Wn. App. 663, 719 P.2d 163 (1986). The Washington court's decision was correct, and as a consequence providing no basis for granting the petition.

III.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari to the Washington State Supreme Court.

DATED this 31st day of August, 1989.

RESPECTFULLY SUBMITTED,

STANLEY A. KEMPNER, JR.
Attorney for Respondent